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No. 89-1854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AMERICAN NATIONAL CAN CORPORATION, *et al.*,
Petitioners,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE, *et al.*,
Respondents.

Petition for Writ of Certiorari to the Washington Supreme Court

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

1. Washington Seeks to Obscure the Continued Facial Discrimination in Its Tax by Injecting a False Issue of Internal Consistency.

Understandably, Washington asks the Court to turn a blind eye to the history of its tax. R. Br. 2-3. That history reveals persistent efforts to preserve discriminatory advantages for local business by changes in phraseology, but not practical effect, each time the tax has been invalidated for discrimination.[2] The problem facing

[1] A listing of the parent and subsidiary corporations of each corporate Petitioner accompanied the Petition.

[2] *See* Petition 2-9. Washington's record of manipulative wordsmithing without change in economic substance resembles that of Florida, as recited in a recent decision by the Court, *McKesson Corp. v. Florida Alcohol & Tobacco Division*, No. 88-192 (U.S. June 4, 1990).

Washington here is that the current version of its tax perpetuates the facial discrimination for which this Court condemned the prior version in *Tyler Pipe Industries v. Washington Department of Revenue*.[3] An Oregon manufacturer, who pays a tax for the privilege of manufacturing in that state, will also pay a selling tax for the privilege of selling in Washington that a Washington manufacturer will not pay. Petition 12-14. This is classic facial discrimination. To obscure that fact, the State's brief has repeatedly suggested that *Tyler Pipe* turned on "internal consistency." Two of the State's titles read: "Tyler Pipe Invalidated the Multiple Activities Exemption Because it Lacked Internal Consistency" and "The Internal Consistency Test Does Not Require a State to Give Credit for Other Types of Taxes."[4] R. Br. 3, 10. Petitioners have conceded that Washington's tax is internally consistent. The injection of that non-issue into the case is simply setting up a straw man and knocking it down to hide the continued facial discrimination.[5]

Convincing proof that *Tyler Pipe* struck down the prior version of Washington's tax *because it was facially discriminatory* can be found in Justice O'Connor's concurring opinion in that case, particularly when contrasted with her dissent in *American Trucking Associations v. Scheiner*, 483 U.S. 266 (1987), decided the same day. Justice O'Connor explained that she joined the *Tyler Pipe* majority opinion " '[i]n light of the facially discriminatory nature of the multiple activities exemption,'. . . . " 483 U.S at 253 (quoting *Id.* at 244). Specifically, Justice O'Connor did "not read the Court's decision as extending the 'internal consistency test' described in *Armco, Inc. v. Hardesty*[6] to taxes that are not facially

[3]483 U.S. 232 (1987).

[4]Additional internal consistency arguments appear under other headings. R. Br. 14, 16-17.

[5]The State's tactic of confusing the internal consistency test with facial discrimination succeeded in confusing the court below. *See* Petition 11 n.7.

[6]467 U.S. 638 (1984).

discriminatory. . . ." *Id.* at 253 (citation omitted). By contrast, Justice O'Connor (joined by the Chief Justice and Justice Powell, author of the *Armco* decision), dissented in *Scheiner* because that case, unlike *Tyler Pipe*, turned on the internal consistency test.

The importance of the fact that facial discrimination was the basis for the invalidation of Washington's tax in *Tyler Pipe* stems from the persistence of facial discrimination in the current version of the tax. Washington's new credit is a tailored credit—tailored to be ineffective for interstate commerce—leaving the practical operation of the tax virtually unchanged. *See* Petition 6-7. Despite claiming that "the credit is working" (R. Br. 6-7), the State has not denied that the benefits received by local business have been 100 times more valuable than those received by interstate commerce.[7] *See* Petition 7-8, 16. Whether such a tailored credit can succeed is an important federal question. The integrity of this Court's decisions in both *Tyler Pipe* and *Armco* depend on how the issue is resolved.

2. In Claiming That the Petition Mischaracterizes the Issue, Washington Distorts Petitioners' Contention: That a Credit, Which Is Supposed to Equalize Burdens, Should Not Be Denied for Reasons Irrelevant to Equalization.

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[7]The State has limited its response to an incorrect claim that "Petitioners did not claim credits under the law," while denying that claiming the interstate credits is burdensome. R. Br. 2, 6 n.6. The State's regulation requires a tracing of ingredients or products from one jurisdiction to another: "other states' tax payments claimed for MATC [*i.e.*, the credit] must be identifiable with the same ingredients or products which incurred tax liability in Washington state, i.e., they must be product specific." Wash. Admin. Code § 458-20-19301(5)(c) (1988). While some petitioners claimed the new credit, others reported that the tracing burden, not shared by wholly local business for whom the credit is automatic, outweighs the tax benefit. Petitioners' Affidavit Nos. 122b, 122d, 122i-122j, 122m, 122q-r, 127. Similarly, while the State makes much of the enlargement of its list of eligible credits from the 27 mentioned in the State's initial list to a current 58, it may be noted that 31 of these are taxes of small towns in West Virginia and South Carolina, hardly significant trading partners of Washington.

The State's assertion that "[w]hat is before this Court is ANC's assertion that if Washington allows a credit for one kind of tax, it must allow a credit for every tax paid by an interstate business" (R. Br. 10) is patent nonsense. Similar distortions appear at the front of the State's brief under the heading "What this case is really about" and later where the State purports to restate the "gravamen" of Petitioners' challenge. R. Br. 1-2, 11. The relief sought by the Petition is much more focused than the State has acknowledged.[8]

Disparity of treatment, as condemned in *Tyler Pipe*, of taxpayers similarly situated (except for location in other states) remains the issue here. Taxes imposed by other states that are measured by the same business revenues that Washington includes in its measure—and that are imposed for performing the same types of activities (manufacturing and selling) that Washington taxes—are ineligible for the credit. The State correctly observes that there is no challenge to the practical application that it has given its amended tax, which appears compelled by legislative design. R. Br. 9-10. The resulting issue is purely a federal one—whether the disparity that occurs by design and in practical effect is unconstitutional discrimination where the disparity is based on peculiarities of tax phraseology and computations that are not relevant to equalizing burdens. *See* Petition 13-22.

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[8]Contrary to the State's assertion, Petitioners make no claim of credit for consumer (sales/use) or property taxes—only taxes resulting from performing the business activities of manufacturing and selling. A similar distinction was made in *Goldberg v. Sweet*, 109 S. Ct. 582 (1989), between taxes on consumers, recognized by the majority as political insiders better able to protect themselves from tax discrimination, and taxes on interstate businesses, which are political outsiders vulnerable to discriminatory attempts to favor local business. *See* Petition 20-21 n.19. Note also that the relief in this case will be in accord with this Court's decision in *McKesson Corp. v. Florida Alcohol & Tobacco Division*, No. 88-192, decided June 4, 1990, rather than "a refund of all of the manufacturing and selling taxes [Petitioners have] . . . paid," as the State asserts. R. Br. 8-9.

Another distortion in Washington's brief is the State's claim that Petitioners' argument is "contrary to the principle that the validity of one state's tax system does not depend on the tax laws of other states." R. Br. 13-14. *Just the opposite is true.* It is the State which has focused on other states' taxes by making some eligible and many ineligible for the credit. Petitioners deny that the focus of such a credit should be on perfect conformity in the taxable incidents and details of calculation. Instead, Petitioners' contention looks to economic effect, inquiring whether other taxes include the same revenues in their measure as Washington does, and whether the other taxes result from performance of the same activities that form the basis for Washington's tax.

3. Washington's Attempted Distinction of *New Energy* as Limited to Forced Reciprocity Ignores the Underpinnings of That Decision.

The State's brief asserts that "Reciprocity is the evil at which *New Energy*[9] is directed" (R. Br. 22) and follows with the observation that "Washington's credit mechanism does not have a reciprocity requirement." R. Br. 22. But the *New Energy* rule against discrimination is broader than that. It condemns other forms of favoritism toward local business as well as forced reciprocity. *New Energy* placed reliance on *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 349-351 (1977), in which the Court "found invalid under the Commerce Clause a North Carolina statute that did not exclude apples from other States, but merely imposed additional costs upon Washington sellers and deprived them of the commercial advantage of their distinctive grading system." 486 U.S. at 275. No reciprocity was involved. Similarly, *New Energy* relied upon *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), in which the Court struck down a New York law requiring that the initial purchase of milk imported into the State be made at or above the New York State-mandated price. 486 U.S. at 275.

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[9] *New Energy Co. v. Limbach*, 486 U.S. 269 (1988).

4. Washington's Claim That Its Disparity of Treatment Meets the *New Energy* Standard of Justification Because the Taxes Ineligible for Its Credit are "Fundamentally Different" Presents an Issue That Is Itself an Important Federal Question.

The Oregon manufacturer who pays Oregon's "privilege" tax for manufacturing in Oregon will also pay a "privilege" tax for selling in Washington that a Washington manufacturer will not pay. Washington justifies this denial of equal treatment on the ground that the Oregon tax is "fundamentally different," even though both taxes are imposed on the "privilege" of doing business and include the same revenues in their measures.[10] That is because deductions allowed in determining the Oregon tax base would cause Oregon's tax to be labeled an "income tax" under Washington law even though the Oregon Supreme Court has held that Oregon's tax is not an income tax. *See* Petition 13. This paradox is justified by Washington because Oregon narrows its tax base by deductions before multiplying the base by a tax rate of 6.6% to arrive at the tax, whereas Washington calculates its tax with a broader base, allowing only a few deductions (for bad debts, transportation expenses, etc.), multiplied by a much lower tax rate of roughly .5%. These details of tax calculation ought to be within the province of each state. Washington's credit, however, makes them crucial to parity of tax

[10]Washington's brief repeatedly characterizes its taxes as "transaction taxes," as if that term were an accepted part of tax lexicon. R. Br. i, 1-5, 7-9, 11-13. But the State has cited no authority suggesting that the phrase is a term of art or descriptive of any particular kind of tax. Indeed, as Washington uses "transaction" in the phrase "transaction of *manufacturing*" it necessarily has a broad and amorphous meaning going well beyond the usual and ordinary sense of the word, which is the act of "carry[ing] on or conduct[ing] (business, negotiations, activities, etc.) to a conclusion or settlement." Random House Dictionary of the English Language (2d ed. 1987). R. Br. 5, 12-13. In short, the "transaction" characterization is as arbitrary as Washington's claim that its taxes are "fundamentally different" from other taxes that are measured by the same revenues and imposed as a result of performing the same types of manufacturing and selling activities.

treatment.[11] An important federal question is presented where the producers and sellers from other states can have parity of tax treatment with local taxpayers in Washington only on condition that the required level of conformity is met.[12]

5. Conclusion: An Important Federal Question Is Presented.

As Washington correctly observes, this Court has invited the use of credits. R. Br. 4-5. In accepting that invitation, Washington devised a credit narrowly tailored to perpetuate the practical effect of the previously condemned tax. Not even Washington has denied the importance of determining whether such a credit, having minimal practical effect, is consistent with the Court's holdings in *Armco* and *Tyler Pipe* and with the principles laid down in the leading case of *Complete Auto Transit.*[13] Given the ease with which states can achieve or maintain local favoritism with credits fashioned like Washington's, the issue of whether Washington has met the "high" burden of justification for disparate treatment

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[11]The State's citing of practical difficulties in computing credits for taxes allowing more deductions than Washington allows (R. Br. 12 n.20) is specious considering the additional burdens already imposed on interstate commerce by Washington's "product specific" credit requiring tracing of ingredients and products from place to place. Wash. Admin. Code § 458-20-19301(5)(c). Only local business gets an automatic credit.

[12]The State argues that the petition is "inaccurate" because Washington has approved taxes that have a different *name* than Washington's tax. R. Br. 7. But the Petition makes clear that the vice is not control over the tax *name*, but rather forced conformity in taxable "incidents" and details of calculation. Petition 19-20. The Indiana and Kansas City, Missouri taxes mentioned by the State as examples of eligible taxes have incidents and methods of calculation that conform precisely to Washington's system.

[13]430 U.S. 274 (1977).

See Brief of the Committee on State Taxation of the Council of State Chambers of Commerce as Amicus Curiae in Support of Petitioners for a discussion of the relevancy of *Complete Auto Transit* principles.